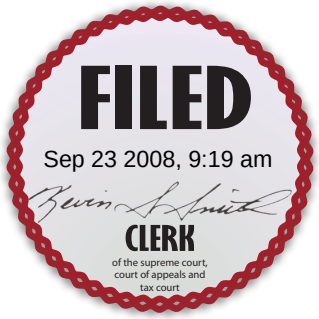

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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH OOTEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0804-CR-192
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Jr., Judge
Cause No. 71D08-0705-FC-144

September 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Joseph Ooten appeals his conviction, after a jury trial, of burglary, a class C felony.

We affirm.

ISSUE

Whether sufficient evidence of Ooten's intent to commit burglary supports his conviction.

FACTS

Stephanie Morley and Merle Tuning were a homeless couple, and for three months before September 16, 2006, Ooten was "like one of [their] family," sharing sleeping quarters and food with them. (Tr. 94). The threesome "scrapped[1] together and shared the money" they received, "split[ting] it three ways." (Tr. 95). On September 15th, Ooten "slept with" scrap metal they had found, and the next morning the three went to a salvage yard and sold over one hundred pounds of scrap metal. (Tr. 76).

On several earlier occasions, in Ooten's presence, Tuning had discussed "scrapping out" an old industrial building at 1505 West Prairie Avenue – Indiana Land Trust 1503. (Tr. 53). On the morning of September 16th, the threesome talked about doing more scrapping to raise money – which they "would all share." (Tr. 88). That morning, they sold the scrap they already had and divided the money; but they "wanted more money." (Tr. 62). They went to the Land Trust building. Morley slipped under an

[1] A witness testified that property is "scrapped" when materials with salvage value are stolen from it.

overhead garage door, and Ooten and Tuney entered through a nearby door after Morley removed its security bar.

Someone across the street observed their entry, and the police were called. When the police arrived, they found all three; Ooten was wearing gloves and "reaching up into the ceiling area," with his "hands inside the ceiling." (Tr. 111, 103). All were arrested and charged with burglary as a class C felony.

On February 4-5, 2008, Ooten was tried before a jury. Morley testified that they had entered the Land Trust building because they "wanted to scrap it out." (Tr. 53). She testified that inside, they "were . . . taking what was left" of the salvageable metal. (Tr. 65). She further testified that Ooten put on a pair of gloves and found a long strip of aluminum, which he proceeded to bend for their collection, and then "was . . . pulling . . . down" wires from the ceiling for their collection. (Tr. 89).

The trustee for the Land Trust building testified that he had not given Ooten, Morley, or Tuney permission to enter the building; nor had he given them permission to remove materials therefrom. Further, photographs depicting forced entry damages to an overhead garage door and a nearby entry door were admitted into evidence. These were the doors where the observer had seen the threesome enter the building. The trustee testified that five days before Ooten's apprehension on the property, there had been no such damage to the door, and that both were securely closed. The jury returned a verdict finding Ooten guilty of burglary, a class C felony.

DECISION

The standard of review we apply when considering an appellant's claim that the conviction is not supported by sufficient evidence has been recently summarized by Indiana's Supreme Court as follows:

> When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted, emphasis in original).

Indiana Code section 35-43-2-1 provides, "A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary," a class C felony. The charging information alleged that Ooten did break and enter the Land Trust building with the intent to commit theft, the knowing exertion of "unauthorized control over the property of another with the intent to deprive the other person of any part of its value or use." Ind. Code § 35-43-4-2.

Ooten argues that the evidence was insufficient to establish that he "had the intent to commit theft . . . at the time" when he entered the building. Ooten's Br. at 3. He reminds us that our Supreme Court recently reaffirmed that the intent to commit the

felony of theft may not be inferred solely from the evidence of breaking and entering. *Freshwater v. State*, 853 N.E.2d 941, 943 (Ind. 2006) (citing *Justice v. State*, 530 N.E.2d 295, 297 (Ind. 1998)). Moreover, a "criminal conviction for burglary requires proof beyond a reasonable doubt of a specific criminal intent which coincides in time with the acts constituting the breaking and entering," with that intent being to commit the criminal offense alleged in the charging information. *Freshwater*, 853 N.E.2d at 943-44 (quoting *Gebhart v. State*, 531 N.E.2d 211, 212 (Ind. 1988)).

In *Justice*, the defendant was charged with burglary, "specifically breaking and entering with intent to commit theft." *Freshwater*, 853 N.E.2d at 943. Evidence at trial established that the defendant had entered the victim's home with black socks on his hands; that when recognized and called to by the victim, he left the house; and that after the defendant's departure, a window screen was found to have been removed and a door left open. Such was "evidence of breaking and entering," but "there was no fact in the evidence that provided a reasonable inference that the defendant had the specific intent to commit theft." *Id.*

In *Gebhart*, the defendant was charged with attempted burglary. The evidence established that the defendant's knock on the residents' door went unanswered; he pried the door open; the residents called the police and "left the house and when [the defendant] saw them looking at him, ran off." *Gebhart*, 531 N.E.2d at 212. The court found such evidence was insufficient to warrant the conclusion of the fact-finder "beyond a reasonable doubt, that the [defendant] had the intent to steal from the house." *Id.*

We find that the evidentiary facts herein are unlike those of *Justice* and *Gebhart*. The jury heard testimony that the threesome had regularly engaged in the scrapping of metal, and that they took the metal to a salvage facility for money and "split it three ways." (Tr. 95). Ooten "slept with" metal that they had scrapped the day before the charged offense, and it was sold and the proceeds divided among the threesome earlier that day. (Tr. 76). Further, Morley testified that they then went to the Land Trust building because they "wanted more money" and "wanted to scrap it out." (Tr. 62, 53). Thus, the jury heard probative evidence to support the reasonable inference of Ooten's specific intent to commit theft when he entered the Land Trust building.

In *Freshwater*, the defendant was charged with the burglary of a car wash. Evidence established that Freshwater had used a screwdriver to force entry to the car wash; an alarm had sounded; and he fled. The court, after reviewing the evidence and its reasoning in *Justice* and *Gebhart*, noted the lack of any "evidence that Freshwater was near or approaching anything valuable in the car wash"; that he was found "outside the building"; and that the owner "testified that nothing was missing from the building or the cash register and that the office appeared to have been undisturbed." 853 N.E.2d at 944, 945. Thus, our Supreme Court concluded that the State failed "to provide evidence" that when "Freshwater entered the car wash," his "reason [for doing so] was to commit theft." *Id.* at 944.

Here, Ooten was found inside the building, with his hands up in the ceiling area. Morley testified that he was then pulling down wire, and that he had previously found and bent a long strip of aluminum for their collection. Moreover, there was evidence that

the threesome effected a forceful entry into the building, and probative evidence of their intent for that entry has previously been noted. We find that sufficient evidence established "a solid basis to support a reasonable inference" that when Ooten entered the Land Trust building, his reason for doing so was to commit theft. *Freshwater*, 853 N.E.2d at 944.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.